DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

26283

FILE: B-211119.3 **DATE:** September 22, 1983

MATTER OF: A.B. Dick Company

DIGEST:

1. GAO will not object to award on a lease with purchase option basis, as permitted under RFP, where agency exercises business judgment that funding will become available during contract for purchase of leased equipment, contract period is lengthy (4 years) and savings to Government will be substantial.

2. Agency properly found that awardee's best and final offer met mandatory specification requirements and that awardee was entitled to onsite demonstration verifying that compliance.

3. Adjustments made to awardee's proposal after best and final offers are not objectionable where adjustments did not affect technical acceptability of proposal.

A.B. Dick Company (A.B. Dick) protests the award of a contract for word processing units to Compucorp by the Department of the Air Force (Air Force) under request for proposals (RFP) No. F41689-82-R-0014.

We deny the protest.

While the protest was pending with our Office, A.B. Dick filed suit against the Government in the United States District Court for the District of Columbia (Civil Action No. 83-1610). The bases for the suit are substantially the same as those presented to our Office in the protest. We initially dismissed the protest in A.B. Dick Company, B-211119.2, August 8, 1983, 83-2 CPD ___, because the court had not indicated an interest in a GAO decision. The court, by order of August 11, 1983, denied A.B. Dick's motion for a preliminary injunction. It also indicated an interest in a GAO decision on the merits. On August 26, 1983, the court issued a memorandum and order in support of its denial of A.B. Dick's motion for preliminary injunction.

The RFP was issued on May 24, 1982, for delivery of a maximum of 160 word processing units. The first 26 units were to be firm orders delivered the first year with an option of an additional 134 units over 4 years. The RFP advised that award would be made to the firm providing a technically acceptable product at the lowest overall cost to the Air Force, a determination which would include a life-cycle cost evaluation. The agency reserved the right to an onsite evaluation of the equipment offered by the low, technically responsive offeror to verify that the equipment would satisfy agency requirements.

The RFP solicited offers under four alternative methods of acquisition subject to the availability of the necessary type of funding at time of contract award: a lease plan, a lease with option to purchase plan, a lease to ownership plan, and a straight purchase plan. Offerors were permitted to submit an offer for any one of the four acquisition plans. The RFP advised that funding was available for the first year requirements only for lease purposes and that there is a "reasonable certainty that only lease funds will be available for future acquisitions." The RFP also contained mandatory and optional technical specifications.

The date for submission of initial offers was July 1, 1982. Twelve companies submitted initial offers. A technical evaluation committee (TEC) reviewed all proposals as to their features by reference to a trade publication of Datapro Research Corporation (DPC), which reviews word processing equipment.

On September 3, 1982, the RFP was amended to clarify certain mandatory specifications and to extend the date for submission of best and final offers to September 20, 1982. (This date was subsequently changed by amendment to September 22.) The amendment advised that where disputes arose over whether a system met mandatory specifications, the onsite demonstration took precedence over any technical literature in determining the outcome. The amendment also notified offerors that "only lease funds are known to be available for the initial increments," and stated that:

> "* * * it is the Air Force's desire to contract on a lease with option to purchase plan in the event purchase money is made available during the contract's life."

On September 23, 1982, the TEC advised the contracting officer that four vendors met all technical mandatory requirements but that A.B. Dick, Compucorp, and another vendor needed to further clarify their technical proposals before they could be considered acceptable. By letters dated September 23, 1982, the Air Force advised offerors of the need to clarify their offers, and a new due date of November 8, 1982 was established for revised best and final offers, including prices. Based on the recommendation of the TEC, it was concluded that Compucorp's best and final offer was acceptable. The contracting officer performed an evaluation of price proposals and Compucorp was determined low offeror at a total evaluated price including life-cycle costs of $1,541,587 under its lease with option to purchase offer. A.B. Dick's offer for lease with purchase option was $1,785,135.29. A.B. Dick's lease offer was $2,620,132.49. The Air Force concluded that Compucorp's offer would result in substantial savings if purchase money eventually could be found. The Air Force then had Compucorp's equipment tested onsite as called for by the RFP. Following testing from December 15 to January 19, 1983, it was concluded the equipment met the mandatory specifications and was acceptable. Award was made to Compucorp on February 16, 1983.

A.B. Dick contends that Compcorp's best and final offer was technically unacceptable because it did not meet mandatory specifications and that, because of this, the Air Force improperly permitted an onsite evaluation of Compucorp's equipment; that, in any event, the Air Force should have rejected Compucorp's offer based on the onsite evaluation; and that the Air Force improperly held post-best and final offer discussions with Compucorp, permitting Compucorp to make changes in its system with regard to the mandatory, technical requirements. A.B. Dick asserts that in accepting Compucorp's technically deficient proposal, the Air Force, in effect, changed the requirements of the RFP without permitting other offerors an opportunity to compete on the basis of these changed requirements. A.B. Dick also argues that it was unreasonable for the Air Force to award a contract on the basis of a lease with option to purchase plan where the agency was uncertain that it would obtain funding for purchase.

Initially, we note that the Air Force argues that A.B. Dick's protest was untimely filed here under our Bid Protest

Procedures. A.B. Dick filed its protest with GAO on the grounds specified above on May 24, 1983. Our Bid Protest Procedures require that bid protests be filed with the contracting agency or GAO not later than 10 working days after the basis for protest is known or should have been known, whichever is earlier. 4 C.F.R. § 21.2(b)(2) (1983).

In this connection, award was made to Compucorp on February 16, 1983, but the Air Force failed to send A.B. Dick formal notice of award. However, from that time until a May 3 debriefing, the protester met with agency contracting officials on several occasions. Based on those meetings, documents furnished to the protester, and the protester's independent investigation of Compucorp's proposed equipment, A.B. Dick possessed all information necessary to formulate the above protest grounds. Consequently, we agree that the May 24 protest was untimely filed, that is, more than 10 days after May 3.

However, since we have been requested by the court for our opinion on the merits, we will discuss the protest issues. See 4 C.F.R. § 21.10 (1983).

A.B. Dick asserts that it was unreasonable for the Air Force to award a contract to Compucorp on the basis of its lease with option to purchase offer because it is unlikely that funding to exercise the purchase option would become available at any time during the 4-year life of the contract. Also, A.B. Dick points out that, at the time of the award, the Air Force budget for fiscal year 1984 had been prepared, and thus the Air Force knew it would not be able to purchase the equipment by July 1, 1984, the RFP date for evaluation of that option. Finally, A.B. Dick states that, at the debriefing, an Air Force representative stated that the Air Force had no intention of purchasing the equipment at any time during the contract. Therefore, A.B. Dick concludes it was entitled to award as offering lowest overall lease cost to the Air Force.

The Air Force denies that any officials told A.B. Dick that the Air Force did not have any intention of purchasing Compucorp's equipment. In any event, the RFP notified all offerors of the funding uncertainties, the criteria for evaluating price, and that the Air Force specifically preferred an award on the lease with purchase option, notwithstanding the possible lack of funds for that option. Offers clearly were evaluated as to the price in accordance with

the RFP provisions, and, under this evaluation, Compucorp offered the lowest overall cost to the Air Force. The July 1, 1984, date for purchase was used solely for evaluation and we note that this date does not mean that the Government cannot exercise the option at any time during the 4-year contract period. The Air Force's decision to award a lease with option to purchase because it was evaluated at $1.1 million less than the straight lease on the possibility of future funding was not unreasonable in these circumstances. Here, the contracting officer made a business judgment that an option to purchase could result in substantial savings to the Government if funding for the purchase became available during a lengthy contract period. See Interscience Systems, Inc., B-199918.2, March 25, 1981, 81-1 CPD 222; Cf. System Development Corporation, et al., B-204672, March 9, 1982, 82-1 CPD 218.

A.B. Dick contends that Compucorp's proposal failed to meet mandatory specification requirements.

Generally, it is not the function of our Office to independently evaluate the technical adequacy of proposals. ITEL Corporation, B-192139.7, October 18, 1979, 79-2 CPD 268. The overall determination of the relative desirability and technical adequacy of proposals is primarily a function of the procuring agency, which enjoys a reasonable range of discretion in the evaluation of proposals. ITEL Corporation, supra. Therefore, such determinations will not be disturbed by our Office absent a clear showing that the determination was arbitrary or unreasonable. CompuServe Data Systems, Inc., B-202811, February 17, 1982, 82-1 CPD 137. Furthermore, the protester has the burden of affirmatively proving its case, and a protester's technical disagreement with the evaluation of a proposal does not, in itself, satisfy this requirement. Zuni Cultural Resource Enterprise, B-208824, January 17, 1983, 83-1 CPD 45.

Because of our conclusion below that Compucorp's best and final offer met the RFP's mandatory specification, the agency decision to conduct an onsite demonstration was proper under the RFP. In any event, we agree with the agency that the RFP contemplated that uncertainty as to compliance could be resolved by the onsite demonstration. As mentioned above, the RFP stated:

> "Where disputes arise over whether a system meets mandatory specifications, the onsite demonstration takes precedence over any technical literature in determining the outcome."

The first specification deviation cited by the protester involves the requirement that "the system must have variable proportional spacing of screen lines to be printed," and, by amendment, that "the word processor * * * be able to show characters in different pitch and/or proportional spacing on the display." A.B. Dick argues that the Air Force concedes Compucorp's equipment did not meet the amendment's display requirement. The Air Force responds that the amended provision was listed under printer station features and was not intended to require variable proportional spacing to be visible on the display. We agree with the Air Force's interpretation. Although the language lends itself to A.B. Dick's interpretation, the location of the amended provision convinces us that the ability to provide this on the printer alone met the requirement. In this regard, we note that there is a separate section stating mandatory specifications for the display.

The next alleged deviation is from the RFP specification that:

> "The system must provide for different line spacings (single, double, triple, etc.) without performing manual setting changes on the printer and must visually display line spacings in 1/4 line space increments from 1/4 line space through 3 line spaces."

Initially, A.B. Dick asserts that by letter of September 23, 1982, the TEC reported to the contracting officer that the Compucorp proposal needed further clarification because under auto line spacing Compucorp offered 1, 1.5., 2, 3 space increments instead of 1/4 line space increments. A.B. Dick states that it was found "nonresponsive" under its initial offer for essentially the same reason and that, consequently Compucorp's best and final offer should have been rejected. However, the record shows that offerors were permitted to submit revised best and final offers on November 8, 1982, and at that time, the TEC found Compucorp's new proposal technically acceptable subject to verification through the onsite evaluation. We have no basis to disregard the Air Force finding that the onsite evaluation verified Compucorp's compliance here.

A.B. Dick also claims the Compucorp equipment cannot perform the requirement under this specification that line

spacing be visually displayed on the screen. The Air Force TEC chairman advises that the system was capable of displaying actual spacing to accommodate multi-level text, and "line spacing appears on the screen as it is printed * * *." In our view, this complies with the mandatory specification.

A.B. Dick asserts that Compucorp's equipment fails to fulfill throughout the procurement the mandatory specification that the system be capable of deleting a character, word, line, sentence, paragraph or specified block with only a single key stroke.

The Air Force states that the system was capable of meeting this requirement. The Air Force specifically points out that a sentence is deleted through multiple steps, by setting the processor into the block mode and depressing the letter "s." Paragraphs are similarly deleted by pressing "p" in the block mode. The Air Force also advises that specification does not require deletion with a single key stroke. We agree with this rationale.

A.B. Dick refers to the rejection of another offer as "nonresponsive" because "* * * [that] Vendor is unable to delete a sentence or paragraph directly but must employ block delete," as showing the Air Force intended to require single key stroke deletion. While this may indicate inconsistent treatment of offers, it does not show any requirement for a single key stroke in the specification.

A.B. Dick asserts Compucorp's equipment did not meet the text recovery specification, which requires that the system provide journaling or "before image" backup recovery or functional equivalent. Initially, we note that the protester points to no exception taken to this requirement in Compucorp's best and final offer. The Air Force states that this requirement was meant to permit an operator to recall an original or "before image" (uncorrected original) document to the screen after the operator has made changes in the document. The Air Force advises that Compucorp's equipment performed this function by duplicating the document on a disc. The original document can then be recalled by the name assigned it. The revised version can be retrieved in the same manner. We find this explanation by the agency of how Compucorp's equipment satisfied this requirement persuasive.

Finally A.B. Dick contends that Compucorp's offer did not meet the requirement that the system visually display pitch codes adjacent to the text that differs from standard text format, and that the codes be visible on the screen. The Air Force has reported that the system visually displayed pitch codes adjacent to the text and that the pitch codes can be viewed in "Trace" mode. A.B. Dick's evidence that Compucorp's equipment does not conform to this requirement is the St. Louis computer exposition demonstration. The demonstration allegedly showed that the pitch codes were displayed only in the trace mode, which is not a standard operating mode. The demonstration further allegedly showed that the only way to determine the pitch type for a given page or change the pitch type for text was first to go to the status page, another page in the system, to identify the pitch type and/or change it. As A.B. Dick points out, the Air Force does not explicitly refute this, but points out that the specifications do not require that "pitch codes be visible in each and every mode in which the system operates." There is no evidence that the Air Force meant to require that functions could not be operated from other than the standard mode of operation, or specifically in this instance, to prohibit displaying pitch codes under the trace mode.

A.B. Dick alleges improper discussion were held with Compucorp after best and final offers during the onsite evaluation. While the TEC unanimously found that Compucorp's equipment met all mandatory specifications, the Air Force advises that Compucorp was permitted to make "minor" adjustments in its software during the onsite evaluation including adding a spelling/dictionary to the system and other features not required under the RFP. There is no evidence presented that these adjustments were essential to the acceptability of Compucorp's proposal. See C3, Inc.; M/A-Com Sigma Data, Inc., B-206881, 206881.2, May 14, 1982, 82-1 CPD 461, in which we found that after award selection has been made, submissions from a potential awardee which are not essential to acceptability of the offeror's proposal do not constitute discussions and may be accepted by the Government.

Protest denied.

Milton J. Socolar

for Comptroller General
of the United States